

1
2
3 UNITED STATES BANKRUPTCY COURT
4 NORTHERN DISTRICT OF CALIFORNIA

5 In re

6 NACIO SYSTEMS, INC.,

No. 02-10596

7 Debtor(s).
8 _____/

9 Memorandum of Decision re Amended Plan
10 _____

11 Background

12 The court confirmed the debtor's Chapter 11 plan of reorganization on January 10, 2003.
13 Confirmation was consensual; the debtor, after considerable negotiations, reached accord with its major
14 creditors. The order confirming the plan was entered on January 14, 2003, and was not appealed and
15 became final on January 24, 2003, which was the effective date of the plan.

16 The plan was to be funded by eSynch Corporation, an outside entity.¹ The stock of Nacio was to
17 be replaced by eSynch stock. In addition, general unsecured creditors were to receive half a share of
18 eSynch stock for each dollar of allowed claim. Most relevant, the plan provided: "As soon as
19 practicable after the Effective Date, eSynch will consummate the purchase of the outstanding shares of
20 NACIO and will fund the Chapter 11 plan by contributing, to the extent not already advanced, a total of
21 \$500,000.00 to the working capital of NACIO." The plan also specified the persons to manage and
22 control the reorganized debtor, subject to an election of directors to be held within 90 days after
23 confirmation.²

24 _____
25 ¹eSynch and its counsel repeatedly refer to eSynch as a "plan proponent." This is false; the only
26 plan proponent was the debtor.

²eSynch identifies a third responsibility it says it has under the plan, to provide a certain letter of
credit. However, the plan makes it clear that this is a responsibility of the reorganized debtor, not
eSynch.

1 There is conflicting testimony as to whether eSynch issued any of its stock to either creditors or
2 equity holders. eSynch claims it did both, although the debtor introduced evidence that an individual
3 claiming to be a proxy holder had not released the Nacio shares and the principal unsecured creditors
4 testified that they had received no shares. From the evidence presented it appeared that eSynch had
5 issued the shares to the equity holders but not the unsecured creditors, and the court so finds. However,
6 that this not the critical issue in this case.

7 Despite the unambiguous language of the plan quoted above, which required eSynch to fund
8 \$500,000.00 in working capital as soon as practicable after the effective date, eSynch decided to take a
9 “go slow” approach and not provide the \$500,000.00 until its team, and not the management specified in
10 the plan, was in place.³

11 In April, 2003, Nacio made demand on eSynch for the \$500,000.00. eSynch refused, and
12 purported to terminate the employment of officers specified to continue in management by the plan.
13 eSynch also tried to seize Nacio’s bank account. The court issued an injunction to maintain the status
14 quo while this drama played out. Nacio then filed an amended plan, which is now before the court. The
15 amended plan is much the same as the original, except it cuts eSynch out of the picture. The creditors
16 and equity holders are to receive shares in the reorganized debtor rather than eSynch shares. This plan
17 has been overwhelmingly approved by Nacio’s creditors. The only obstacle to confirmation are
18 eSynch’s arguments that the original plan has been substantially consummated, so that it is too late to
19 confirm an amended plan, and that the amended plan is not feasible.

20 21 Substantial Confirmation

22 Section 1127(b) of the Bankruptcy Code provides, in pertinent part: “The proponent of a plan or
23

24 ³As additional grounds for withholding the \$500,000.00, eSynch alleges breach of a management
25 agreement between it and Nacio dated August 19, 2002, which was five months after Nacio filed its
26 Chapter 11 petition. There is nothing in the file to indicate that this agreement was ever noticed to
creditors or approved by the court.

1 the reorganized debtor may modify such plan at any time after confirmation of such plan and before
2 substantial consummation of such plan” eSynch’s primary argument is that it “substantially
3 consummated” the first plan and it is therefore too late for the debtor to seek confirmation of an amended
4 plan.

5 Whether a plan has been substantially consummated is a question of fact to be determined upon
6 the circumstances of each case. *In re Jorgensen*, 66 B.R. 104, 106 (9th Cir.BAP 1986). Generally
7 speaking, a plan has been substantially consummated when most or all of the initial transfers undertaken
8 to shape the new financial structure of the debtor have been completed. *In re Antiquities of Nevada,*
9 *Inc.*, 173 B.R. 926, 929-30 (9th Cir.BAP 1994).

10 The court concludes from the facts of this case that the original plan has not been substantially
11 consummated. Substantial consummation includes payment to be made to the debtor as well as by the
12 debtor. *In re Antiquities of Nevada, Inc.*, 173 B.R. at 930. In this case, neither the \$500,000.00 to be
13 paid to the debtor for working capital has been paid, nor has there been issuance of new shares to
14 unsecured creditors. At most, all eSynch has done is to issue stock to equity holders. Assuming this was
15 done, it can be easily undone and does not, in itself and in the context of this case, constitute substantial
16 consummation.

17 18 Confirmability of the Amended Plan

19 The court has determined that eSynch is a “party in interest” and is accordingly entitled to be
20 heard on the issue of substantial consummation pursuant to § 1109(b) of the Code. However, insofar as
21 the amended plan is confirmed eSynch is nothing more than a frustrated suitor with no vote on the plan.⁴
22 Accordingly, it probably lacks standing to attack the confirmability of the plan. See *In re O'Brien*
23 *Environmental Energy, Inc.*, 181 F.3d 527 (3rd Cir. 1999); *In re Rook Broadcasting of Idaho, Inc.*,
24 154 B.R. 970, 974 (Bankr.D.Idaho 1993).

25
26 ⁴eSynch’s description of itself as a “plan proponent” is wishful thinking.

1 Nonetheless, the amended plan seems feasible and appears to meet all the requirements of the
2 Bankruptcy Code for confirmation. eSynch's argument boils down to a protest that the original plan is
3 more likely than the amended plan to be successfully completed, but that does not make the amended
4 plan unfeasible. Moreover, the largest unsecured creditors in this case have been active and well-
5 represented; the court sees no basis for substituting its judgment for theirs, and they have opted for the
6 amended plan.

7
8 Conclusion

9 The original plan has not been substantially consummated. To the extent that eSynch has standing
10 to object to the amended plan, its objections will be overruled and the amended plan confirmed.
11 Counsel for the debtor shall submit an appropriate form of order, which shall include a permanent
12 injunction forbidding eSynch from asserting ownership rights in the revested debtor and requiring it to
13 undo any stock issuance undertaken pursuant to the original plan.

14
15
16
17


18 Dated: May 9, 2003

19
20
21
22
23
24
25
26

Alan Jaroslovsky
U.S. Bankruptcy Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26